IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1618 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

==========

MOTISINGH @ JASODHASINGH VASUDEV JAT CHAUDHARI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :
THROUGH JAIL for Appellant(s) : 1,MR UA TRIVEDI for Appellant(s) : 1,

MR KT DAVE, APP for Opponent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 11/01/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K. A. PUJ)

1. The appellant – original accused has filed this appeal under Section-374(2) of the Criminal Procedure Code against the judgment and order dated 29.11.2003 passed by the learned Special Judge, Fast Track Court at Anand in Special NDPS Case No.8 of 2000, whereby the appellant – original accused was convicted for an offence under Section-20(b)(i) of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') and was sentenced for the R.I of 10 years with fine of Rs.50,000/- (Rupees Fifty

Thousand Only) and, in default thereof, S.I of six months.

2. The appeal was admitted by this Court on 19.1.2004. Alongwith the appeal the appellant - original accused has prayed for suspension of the judgment and order of the learned Special Judge of Fast Track Court, Anand and also requested to grant bail during the pendency and final disposal of the appeal. However, it appears that this interim prayer might not have been pressed by the appellant at the time of admission of this appeal, as no order has been passed with regard to this prayer for bail.

3. The prosecution story in short is that P.S.I., namely, R.G.Ppatel, Anti Dacoity Squad, Anand, received information that one person aged about 40 to 45 years is going to pass from Anand to Asodar Chokdi with certain intoxicated substance like 'Gunja'. After

registering information in station diary, and further informing DSP regarding the above fact, the raid was carried out in the presence of two panch witnesses as per the information received. In all 11 kg and 800 grams Ganja was recovered from the accused. Thereafter complaint was lodged on 22.11.1999, and on the same date accused was arrested. After the seizure of muddamal, it was sent to the FSL for the opinion and after receiving the report from the FSL, as the prima facie case was made out and as there are sufficient evidence against the accused, the Investigating Officer submitted the charge-sheet before the learned JMFC at Anand. Thereafter, the case was committed to the Sessions Court, Anand. The charge was read over and explained to the accused as he has not pleaded guilty to the charge. The accused was put to trial and tried by the learned Special Judge, Fast Track Court at Anand in Special (NDPS) Case No.8 of 2000.

4. To prove the culpability of the accused the prosecution has examined as many as 11 witnesses, details of which are as under:-

Sr.No.	Particulars	Exh.No.	Page No.
1	P.W No.1 – Dineshkumar Udesingh Thakore. (Witness- rickshaw driver, in whose rickshaw accused was travelling at the time of raid)	12	85-89
2	P.W No.2 – Ranchodbhai G. Patel (Complainant – PSI, who received an information)	13	91-111
3	P.W No.3 – Markand Kantilal Pathak (Scientific Officer- FSL)	23	155-157
4	P.W No.4 – Harishbhai Bhailalbhai (rickshaw driver – panch witness to the raid)	43	193-201
5	P.W No.5 – Pyaresab Pratapsingh (witness – tea vendor, whose scales were used to weigh the substance – hostile)	44	199-201
6	P.W No.6 – Amarsingh Fakirbhai (Panch – witness to the raid carried out)	45	203-207
7	P.W No.7 – Kanubhai Virabhai (P.S.O, Anand Rural Police Station, who was handed over the muddamal & samples)	49	215-219
8	P.W No.8 – Pravinkumar M. Variya (Police Constable, who carried sealed samples to the FSL)	53	229-231

Sr.No.	Particulars	Exh.No.	Page No.
9	P.W No.9 – Kantibhai Dalabhai (Panch witness, Constable member of raiding party)	54	233-237
10	P.W. No.10 – Laljibhai N. Chavda (Panch witness – Writer – Constable member of raiding party)	56	241
11	P.W No.11 – Dalsukhbhai M. Parghi (P.S.I. - I.O who submitted charge-sheet)	57	243-245

5. Prosecution has also produced as many as 16 documents and relied upon the contents of the same, details of which are as under:-

Sr. No.	***Particulars***	***Exh. No.***	***Date***	***Page No.***
01.	Complaint.	14	22.11.99	113-223
02.	Recovery Panchnama.	15	22.11.99	125-135
03.	Order to register offence.	16	22.11.99	137-139
04.	Intimation letter to Sub-Divisional Magistrate regarding offence.	17	22.11.99	141
05.	Intimation letter to DSP.	18	22.11.99	143-145

Sr. No.	***Particulars***	***Exh. No.***	***Date***	***Page No.***
06.	Letter regarding seizure in presence of gazetted officer.	19	2.11.99	147
07.	Written entry regarding arrest of accused.	20	22.11.99	149
08.	Yadi to DSP by I.O.	21	22.11.99	151
09.	Zeox coy of V.H.F Message.	22	22.11.99	153
10.	Acknowledgment of muddamal received by FSL.	24	25.11.99	159
11.	Forwarding Letter No.99/NC/87 of FSL	25	09.12.99	161
12.	Report of Chemical Department of FSL	26	08.12.99	163-165
13.	Report of Botanical Department of FSL	27	08.12.99	167-171
14.	Copy of Entry No.17 in Station Diary.	41	22.11.99	189
15.	Entry of muddamal sent to FSL.	58	24.11.99	247-249
16.	Letter of FSL for return back of muddamal.	59	09.12.99	253

6. After recording of the evidence of the prosecution witnesses was over, the learned

Special Judge, Anand explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement under Section-313 of the Code. In his further statement, the accused has denied the case of the prosecution by reiterating that he has been falsely implicated.

7. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Special Judge, Anand has held that the accused is guilty of committing an offence under Sections-20(b)(i) of the Act and he was convicted of the said offence.

8. Learned Judge thereafter heard the accused and his advocate on sentence and looking to the gravity of the offence committed by the accused and looking to the circumstances, accused was sentenced to suffer R.I of 10

years and fine of Rs.50,000/- and in default thereof, S.I. Of six months for offence punishable under Section-20(b)(i) of the Act.

9. Being aggrieved by the said judgment and order, the accused has filed the aforesaid appeal before this Court.

10. At the out set it is made clear by Mr.Umesh Trivedi, learned advocate appearing for the appellant that he is not challenging the order of conviction and he was addressing the Court only on the question of sentence. Since he has not challenged the conviction it is not necessary for this Court to reappreciate the evidence. As far as imposition of sentence is concerned, Mr.Trivedi submitted that offence is committed on 22.11.99 and the appellant – accused is in the custody from that date. The appellant – original accused is convicted on 29.11.2003. When the offence was committed

the old act was in force. The Act was amended with effect from 2.10.2001. Under the old Act the production, manufacturing selling, purchasing, transporting warehousing, using, consuming etc, of ganja is prohibited under Section-8(c) and punishment for such production, manufacturing etc was imposable under Section-20(b)(i) for a term which may extend to 5 years and to pay fine which may extend to Rs.50,000/-. Under the amended Act, which has come into force with effect from 2.10.2001, the production, manufacturing etc, of ganja is punishable under Section-20(b)(i) with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees.

11. Mr.Trivedi has, however, submitted that Section-41 of the Amended Act, 2001 provides that any person found guilty of any offence punishable under the principal Act, as it

stood immediately before such commencement, shall be liable for punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence. Thus, on 22.11.1999 when the offence was committed it was punishable with imprisonment for 5 years. The provisions of the amended Act would not be applicable and hence under no circumstance the appellant-accused could have been convicted for any term larger than the term of 5 years. Mr.Trivedi has, therefore, submitted that the appellant is in jail since 22.11.1999 and as on today he has already completed more than 7 years. His confinement beyond 5 years would be totally illegal and unjustified and hence the appellant-accused deserves to be released forthwith.

12. Mr.K.T.Dave, learned Additional Public Prosecutor, on the other hand submitted that during the course of investigation and trial

the Amended Act was very much in force and the date on which the Session Case was decided by the learned Special Judge, Anand the Amended Act is in force and hence the punishment of R.I of 10 years is rightly imposed by the learned trial Judge and no interference is called for, especially when the appellant-accused has not pressed his ground challenging the conviction.

13. To appreciate the controversy raised before the Court, it is worthwhile to have a close look at the relevant provisions of the Act. Section-8 prohibits certain operations. Sub Section-(c) of Section-8 says that, *"No person shall - produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance."*

14. Section-20 of the Act imposed punishment

for contravention in relation to cannabis plant and cannabis. Section-20(b) reads as under :- *"Whoever, in contravention of any provisions of this Act or any rule or order made or condition of license granted thereunder:-*

produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable, -

(i) where such contravention relates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees;

15. By virtue of the Narcotic Drugs and Psychotropic Substances Act, 2001 Section-20(b)(ii) is amended and after its amendment it reads as under :-

"Section-20 Punishment for contravention in relation to cannabis plant and cannabis – whoever, in contravention of any provisions of this Act or any rule or order made or condition of license granted thereunder,-

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable-

(i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees; and

(ii) where such contravention relates to sub-clause (b),-

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine, which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;

(C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the Court may, for reasons to be

recorded in the judgment, impose a fine exceeding two lakh rupees.)

16. Section-41 of the Amendment Act, 2001 deals with application of the said Act to pending cases. Sub Section-1 of Section-41 of this Amendment Act reads as under:-

"Sub Section-1 of Section-41 – Notwithstanding anything contained in sub-section (2) of Section 1, all cases pending before the Courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence;

Provided that nothing in this section shall apply to cases pending in appeal."

17. Section-41(1) has come up for

consideration before the Hon'ble Supreme Court **in the case of Basheer alias N.P.Basheer vs. State of Kerala, reported in (2004) 3 Supreme Court Cases 609**. It is observed by the Hon'ble Supreme Court that by this section, Parliament has declared its intention to apply the amended provisions of the Act to: (a) all cases pending before the court on 2.10.2001; (b) all cases under investigation as on that date; and provides that these categories of cases shall be disposed of in accordance with the provisions of the 1985 Act as amended by the Act of 2001. In other words, the benefit of the rationalised sentencing structure would be applicable to these categories. The proviso, however, makes an exception and excludes the application of the rationalised sentencing structure to cases pending in appeal. The Court further observed in para-12 of the judgment that all statues must be interpreted as prospective in operation, unless

retrospectivity is expressly declared by the statute or to be inferred as the necessary intendment from the language used in the statute. As far as the amendments introduced in the NDPS Act, 1985, by Act 9 of 2001 are concerned, Section-41, in term, says that the amending Act would apply to all cases pending before the court or under investigation on the date of commencement of the amending Act. In other words, it is to be applied retrospectively. If the Act had contained any provisions to the detriment of the accused, then undoubtedly, it would have been hit by the rule against post facto legislation contained in Article 20(1). However, the court found that the amendments (at least the ones rationalising the sentencing structure) are more beneficial to the accused and amount to mollification of the rigour of the law. Consequently, despite retrospectivity they ought to be applied to the cases pending before the Court or even to

cases pending investigation on the date on which the amending Act came into force. Such application would not be hit by Article 20(1) of the Constitution.

18. From the aforesaid observations made by the Hon'ble Supreme Court, it is clear that the Hon'ble Supreme Court was mainly concerned in that case with rationalisation of the sentence structure. The controversy which arises before this Court in the present appeal was not there before the Hon'ble Supreme Court. However, the observations which have been made to the effect that if the Act had contained any provisions to the detriment of the accused, then undoubtedly, it would have been hit by the rule against post facto legislation contained in Article 20(1), would certainly help the present appellant and it would be a guiding factor to resolve this controversy. The Court was also mindful of the fact that the amendment in the

form of rationalising the sentencing structure is more beneficial to the accused and amount to mollification of the rigour of the law. However, if on the basis of this amendment a person who has committed the offence prior to this amendment, subjecting him conviction and sentence of 5 years and whose offence was investigated and tried after the said amendment shall not be made him liable to the enhanced sentence of 10 years instead of 5 years, as it would certainly hit by rules against post facto legislation contained under Article-20(1) of the Constitution of India.

19. Article-20(1) reads as under :-

"Article-20(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the

offence.

20. Prohibitions imposed by Article-20 are directly relevant to the criminal process. Clause (1) is concerned with the substantive law of criminal liability and penalty. Later portion of this article clearly reveals that no person shall be subjected to penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The offence admittedly committed on 22.11.1999. On that date, old provisions are in force and for commission of such offence, the accused appellant was liable to be sentenced for imprisonment of 5 years and fine of rupees fifty thousand and in default thereof S.I of 6 months. If the amending provisions are made applicable to the appellant's case in that case the appellant-accused would be liable to be sentenced for R.I of 10 years with fine of Rs.1 lakh and in default thereof

S.I of 1 year. This should not be the intention of the legislature and it would hit by the rule against post facto legislation contained in Article-20(1) of the Constitution of India.

21. It is true that the above contention has not been raised before the trial Court and the trial Court had no occasion to deal with the said contention. However, this being a question of law and since no new facts are required to be investigated and there is no dispute about the fact that the offence was committed on 22.11.1999, we are of the view that the sentence of R.I of 10 years with fine of Rs.50,000/- and in default thereof S.I of six months is not at all justified. The appellant-accused should have been sentenced only for R.I of 5 years with fine of rupees fifty thousand and in default thereof S.I of 6 months. Since the appellant-accused has already undergone the

sentence of more than 7 years, which is more than the sentence imposable under old provisions even with default of fine i.e 5 years and six months, no further sentence is required to be undergone by the appellant-accused.

22. While taking this view, we derive support from the decision of this very Bench of this Court **in case of Thakarshi Naranbhai Patel vs. State of Gujarat & Another, reported in 2006(3) GLH 603**, wherein considering identical facts, the sentence was reduced from 10 years to 5 years by considering the old provisions of the Act.

23. In the above view of the matter, we partly allow this appeal and for the reasons stated hereinabove, reduce the sentence of 10 years with fine of Rs.50,000/- and in default thereof S.I of six months to sentence of R.I 5 years with fine of rupees fifty thousand

and in default thereof S.I of 6 months. Since the appellant has already undergone this sentence, we direct the jail authority to release the appellant-accused forthwith if his presence is not required in respect of any other case. This appeal is accordingly partly allowed.

(A. M. KAPADIA, J.) (K. A. PUJ, J.)

kks